UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SELECT TEMPORARIES, LLC

and Case 31–CA–157821

DIOSELIN GRAY

DECISION, ORDER, and NOTICE TO SHOW CAUSE

On September 13, 2016, Administrative Law Judge Dickie Montemayor issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief which the Charging Party joined, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

1. The judge found, applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing a Mutual Agreement to Arbitrate (the "MAA") that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

Epic Systems concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at __, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at __, 138 S. Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegations that the MAA is unlawful based on *Murphy Oil* must be dismissed.[1]

2. There remains the separate issue whether the Respondent's MAA independently violated Section 8(a)(1) of the Act because it would reasonably be construed by employees to restrict their ability to file unfair labor practice charges with the Board.

At the time of the judge's decision and the Respondent's exceptions, the issue whether maintenance of a work rule or policy that did not expressly restrict employee access to the Board violated Section 8(a)(1) on the basis that employees would reasonably believe it did would be resolved based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer's maintenance of a facially neutral work rule would be unlawful "if employees would reasonably construe the language to prohibit Section 7 activity." Id. at 647. Recently, the Board overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017).

[1] We therefore find no need to address other issues raised by the Respondent's exceptions to the judge's decision regarding this allegation.

Accordingly, we sever and retain this complaint allegation, and we issue below a notice to show cause why the allegation that MAA would reasonably be construed by employees to restrict employees' ability to file unfair labor practice charges with the Board should not be remanded to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

ORDER

The complaint allegation that the maintenance and enforcement of the MAA unlawfully restricts employees' statutory rights to pursue class or collective actions is dismissed.

Further,

NOTICE IS GIVEN that any party seeking to show cause why the issue whether the Respondent's MAA violated Section 8(a)(1) of the Act because it would reasonably be construed by employees to restrict employees' ability to file unfair labor practice charges with the Board should not be remanded to the administrative law judge must do so in writing, filed with the Board in Washington, D.C., on or before October 29, 2018 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C., October 15, 2018.

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD